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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
Amendment of the Commission's Rules Regarding the 37.0 - 38.6 GHz and 38.6 - 40.0 GHz Bands	)	ET Docket No. 95-183 RM-8553
	)	
Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 37.0-38.6 GHz and 38.6-40.0 GHz Bands	)	PP Docket No. 93-253

To: The Commission

APPLICATION FOR REVIEW

Pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. 1.115, and Section 5(c)(4) of the Communications Act of 1934 (as amended), 47 U.S.C. 155(c)(4), Cambridge Partners, Inc., AA&T Wireless Services, Stevan A. Birnbaum, Linda Chester, HiCap Networks, Inc., Paul R. Likins, William R. Lonergan, PIW Development Corporation, Cornelius T. Ryan, SMC Associates, Southfield Communications LLC, Video Communications Corporation, and Wireless Telco (the "Joint Applicants"), by their undersigned counsel, hereby seek expedited Commission review of the November 23, 1999 Order ("Denial Order") in the above-captioned proceeding denying a Joint Motion For Stay ("Joint Stay Motion") filed by the Joint Applicants on October 1, 1999.[1/] The Denial Order

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[1/] See Order, ET Docket No. 95-183 & Docket No. PP 93-253, DA 99-2632 (released November 23, 1999); see, also, Joint Motion For Stay, ET Docket No. 95-183 & Docket No. PP 93-253 (filed October 1, 1999).

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applies an improperly narrow analysis and thus fails to adequately consider the arguments presented in denying the injunctive relief sought in the Joint Stay Motion. For these reasons, and because there is an overriding public interest justification for doing so, the Joint Applicants hereby seek reversal of the Denial Order by the full Commission, and grant of the relief requested in the Joint Stay Motion.

I. BACKGROUND

By the Joint Stay Motion, the Joint Applicants sought to stay the 38.6 - 40.0 GHz Microwave Radio Service ("39 GHz") application dismissal policies and procedures adopted by the Commission in the July 29, 1999 Memorandum Opinion & Order in the above-captioned proceeding (the "Dismissal Orders"), pending the completion of directly related further review proceedings in the United States Court of Appeals For the District of Columbia (the "39 GHz Appeals Case").[2/] By the Dismissal Orders, the Commission ordered the dismissal "without prejudice" of the following classes of 39 GHz applications: (i) all applications, or portions thereof, with mutual exclusivity conflicts that were not resolved as of

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[2/] See Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands; Implementation of Section 309(j) of the Communications Act - Competitive Bidding, 37.0-38.6 GHz and 38.6-40.0 GHz Bands, Memorandum Opinion and Order, 14 FCC Rcd. 12428 (1999)(the "MO&O"). See, also, Bachow Communications, Inc. v. Federal Communications Commission, Case No. 99-1346 (and consolidated cases) (DC Cir., 1999). With the exception of William R. Lonergan, the Joint Applicants are all parties to the 39 GHz Appeals Case by virtue of their status as Appellants and Petitioners in consolidated Case Nos. 99-1361 and 99-1362, respectively. Mr. Lonergan has entered the proceedings as an intervenor.

December 15, 1995; and (ii) all applications, or portions thereof, that had not completed the statutory minimum thirty-day initial public notice period as of November 13, 1995.[3/] The Dismissal Orders also serve to invalidate without justification all voluntary amendments and dismissals to 39 GHz applications that were filed as a matter of right on or after December 15, 1995.[4/] The Dismissal Orders can be readily characterized as both adjudication and rulemaking, a factor that appears to have caused some procedural confusion in these proceedings.

In this regard, and apparently pursuant to delegated authority, the Licensing and Technical Analysis Branch of the Public Safety and Private Wireless Division of Wireless Telecommunications Bureau commenced the ministerial implementation of the Dismissal Orders by documenting the effect of these actions with respect to specific applications. These efforts were commenced even prior to the Dismissal Orders reaching final status. Then, on November 23, 1999, the Licensing and Technical Analysis Branch released a Public Notice (the "Mass Dismissal Notice") documenting the dismissal of 613 individual 39 GHz applications, including 248 applications filed by the Joint Applicants[5/]. Concurrently with the release of the Mass Dismissal Notice, the Wireless Telecommunications Bureau released the Denial Order.

[3/] MO&O, at ¶¶ 2 & 28.

[4/] Id., at ¶¶ 29-38.

[5/] See FCC Wireless Telecommunications Bureau Weekly Public Notice, Report Nos. 2053-2056; see, also, 39 GHz Applications Dismissed, FCC Public Notice, DA 99-2631 (released November 23, 1999).

II. ARGUMENT

The Denial Order employed an improperly narrow analysis in denying the injunctive relief sought in the Joint Stay Motion. Had the Wireless Telecommunications Bureau failed applied the correct standard of review for the showings provided in the Joint Stay Motion it would have granted the relief requested. Even though the Joint Stay Motion established more than an ample legal and public interest basis for grant of the requested relief, developing circumstances indicate an even greater need now for the requested stay of the Dismissal Orders.

A. The Standard of Review Applied Was Improperly Narrow

The Denial Order improperly applies what amounts to a single prong analysis of the showings set forth in the Joint Stay Motion. This error resulted in an inadequate review of the Joint Applicants' stay request. As discussed at length in the Joint Stay Motion, the Commission traditionally reviews requests for stays of its decisions based upon the following: (i) whether issuance of the requested stay will serve the public interest, convenience, and necessity; (ii) whether the issuance of a stay will substantially harm other parties interested in the proceedings; (iii) whether movant has shown that without grant of the requested relief, it will be irreparably harmed; and (iv) whether movant makes a strong showing that it is likely

to prevail on the merits.[6] The Joint Stay Motion set forth concise and dispositive showings on all four prongs.

The Denial Order, however, asserts the novel view that the only operative prong for an analysis of the merits of stay request is proof of irreparable harm. Even a cursory review of the relevant case law disproves this mistaken approach. As discussed and documented in detail in the Joint Stay Motion, the well-settled standard of review for a stay request filed before the Commission or other administrative agency is that a dispositive showing on irreparable harm alone is not a necessary pre-requisite for grant of a stay. A "sliding scale" is often utilized in evaluating the merits of a stay request. If a particularly strong showing is made on only one prong, the requested relief should still issue, even if the Movant has made a weaker showing on other prongs.[7] Had the correct "sliding scale" test been applied, the requested relief would have issued, based on the totality of the circumstances in the instant case.

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[6] See Virginia Petroleum Jobbers Association v. FPC., 259 F. 2d 921, 925 (D.C. Cir. 1958). See, also, In the Matter of Price Cap Regulation of Local Exchange Carriers Rate-of-Return Sharing and Lower Formula Adjustment, 10 FCC Rcd 11979, 11986 (1995).

[7] See Citifed Financial Corp. v. Office of Thrift Supervision, 58 F.3d 738, 747 (D.C. Cir 1995). See, also, Serono Labs, Inc. v. Shalala, 158 F.3d 1313, 1317-18 (D.C. Cir. 1997), Washington Metropolitan Area Transit Commission v. Holiday Tours, 559 F. 2d 841, 843 (D.C. Cir. 1977).

B. The Denial Order Should Be Reversed On The Merits

The Joint Stay Motion set forth dispositive showings on all four above-described analytical prongs, thus providing a sound and complete basis for grant of the requested relief.[8/] To avoid unnecessary repetition, these showings are hereby incorporated by reference. To summarize, as demonstrated in the Joint Stay Motion:

- Issuance of the stay requested will clearly serve the public interest, convenience, and necessity. The stated central public interest objectives of the above-captioned proceedings are to ..."provid[e] for a more orderly structure for the licensing process ... place 39 GHz licenses in the hands of those who value them most, encourage the creation and deployment of new services, ... [and] foster efficient and expeditious use of the 39 GHz spectrum."[9/] The Mass Dismissal Orders have the exact opposite effect. Grant of the requested relief will mitigate these circumstances by eliminating unnecessary added litigation and procedural delays, the squandering of scarce Commission resources, and by injecting efficiency, order, predictability and timeliness into these proceedings. Although the other three showings amply satisfy the respective standards of review that should be applied to them, the public interest implications alone form sufficient justification for grant of the instant Motion.[10/]

- No party will suffer any substantial harm if the relief requested in the instant Motion is granted by the Commission; indeed, a stay will only benefit all parties, including the Commission. Regardless of the outcome of disputes relating to the disposition of particular applications under the Dismissal Orders, the ultimate resolution of all relevant disputes will be determined by the outcome of the 39 GHz Appeals Case. Rather than harming any party in any material fashion, grant of the stay requested will expedite the resolution of matters in dispute,

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[8/] Joint Stay Motion, at pp. 4-12.

[9/] MO&O, at ¶ 25.

[10/] See FN 7, supra.

thereby benefitting all concerned applicants, the Commission, and the public at large.

- Absent grant of the relief requested in the instant Motion, the Joint Applicants and all other similarly situated parties will be irreparably harmed. Among other things, the market positioning losses caused by the lengthy delays in these proceedings already have caused a degree of irreparable harm, and that harm will only increase if the Commission proceeds with individual licensing actions before the Appeals case is completed. Moreover, assuming *arguendo* that the Joint Applicants were to "replace" the authorizations lost through the Dismissal Orders by participating in and winning the relevant auction, and subsequently prevail on the merits in the Appeals Case, the Joint Applicants will have been compelled to pay for licenses that they should have properly received without charge under the pre-existing rule structure.

- Because the key rulings underlying the Dismissal Orders are patently flawed, the Joint Applicants are likely to prevail on the merits in this case in the Court of Appeals. The MO&O failed to provide a reasoned basis for departure from prior precedents and policies, violated due process, and was arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with the law. Each of the key operative rulings comprising the Dismissal Orders are presented without proper reference to legal authority, or indeed to any other form of precedent. By relying on legal and factual distortions, and by failing to provide any other legitimate support or justification for these rulings, the Commission has continued its established pattern of arbitrary and capricious agency action in these proceedings.

Contrary to the assertions in the Denial Order, the requisite showing requirements for the stay requested were met or exceeded in the Joint Stay Motion, and the balance of the equities tips heavily in favor of a grant of the relief requested. Moreover, the circumstances that have evolved since the submission of the Joint Applicants' stay request only serve to amplify the need for the relief sought. Accordingly, the Denial Order should be reversed on the merits.

III. PROCEDURAL MATTERS

The instant Application For Review is the unavoidable result of procedural events that are beyond the control of the Joint Applicants. Even though the Joint Stay Motion was explicitly directed to the full Commission, the Denial Order was issued under delegated authority by the Deputy Chief of the Wireless Telecommunications Bureau. But for the issuance of the Denial Order as a delegated authority action, and not as an Order of the full Commission, and the explicit provisions of Section 5(c)(4) of the Communications Act, the Joint Applicants would have the immediate option of seeking to consolidate review of the Denial Order in the 39 GHz Appeals Case. However, because Section 5(c)(4) expressly bars the direct judicial appeal of a delegated authority action and instead requires the prior prosecution of an Application For Review before the full Commission, the Joint Applicants are left with no option but to file the instant Application For Review to preserve their rights in the instant matter.

The Joint Applicants have consistently made all possible efforts to expedite all aspects of the 39 GHz review proceedings. Accordingly, the Joint Applicants respectfully request expedited action on the instant submission. Whatever the outcome, the Joint Applicants are determined to preserve their rights and resolve these matters in as expeditious manner as possible.

IV. CONCLUSION

For the foregoing reasons, the Joint Applicants hereby seek expedited review and reversal of the November 23, 1999 Denial Order in the above-captioned proceeding, and issuance of the injunctive relief sought in the Joint Stay Motion pending judicial review of the Commission's policy decisions in these proceedings.

Respectfully submitted,

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December 23, 1999

CERTIFICATE OF SERVICE

I, Shannon L. Riley, hereby certify that on the 23th day of December, 1999, true and correct copies of the foregoing "Application for Review Re: ET Docket 95-183; PP Docket 93-253 (DA 99-2632)" were mailed, first-class postage prepaid, to the following:

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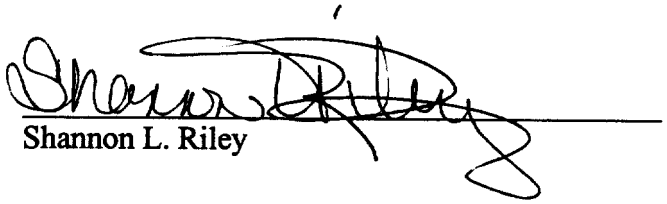

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